Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

JOHNSON WISDOM,

Petitioner,

v.

RON WARD, Warden,
Oklahoma State Penitentiary

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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25(?

QUESTIONS PRESENTED FOR REVIEW

1. Does the state's failure to provide the hearing impaired Defendant access to his hearing aid before interrogation show that the Defendant did not voluntarily, knowingly and intelligently waive his constitutional right to silence.

2. Do police deceptions and implied promise of leniency that induce admissions from the Defendant affirmately show that the Defendant voluntarily, knowingly and intelligently waived his constitutional right to silence.

PARTIES TO THE PROCEEDINGS

The parties are reflected accurately in the caption: Petitioner was the Appellant in the proceeding below; Respondent was the Appellee and the Warden of the Oklahoma State Penitentiary where Petitioner was incarcerated.

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BASIS OF JURISDICTION

A panel of the United States Court of Appeals for the Tenth Circuit affirmed the denial of habeas corpus relief on May 18, 1999. Wisdom v. Ward, Case No. 98-7114 (10th Cir. 1999) (App. 1a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 2254(1). No other actions are pending in this matter. This writ of certiorari is due August 16, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1a) is reported at 1999 WL 311684 (10th Cir. (Okla.)). There was no request for rehearing. The decision of the United States District Court for the Eastern District of Oklahoma denying habeas corpus relief is unreported (App. 4a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Fifth Amendment (in relevant part):

> No person shall be held to answer for a capital, or otherwise infamous crime...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law;...

Sixth Amendment (in relevant part):

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . .

Fourteenth Amendment (relevant part):

> ...nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On February 8, 1994, Petitioner was charged with the first degree child abuse murder of Alton Wisdom in Johnson County District Court in Case No. CF-94-10. The jury found Petitioner guilty of first degree murder, and sentenced Petitioner to death.

The Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction for first degree murder, but remanded his case for resentencing because the trial court erroneously precluded a defense expert's testimony at the sentencing phase. Wisdom v. State, 918 P.2d 384 (Okla. Crim. App. 1996). Pursuant to a plea agreement, the Oklahoma district court sentenced Petitioner to life without parole. No further state appeals were taken.

Petitioner timely filed his original writ of habeas corpus, and the district court denied relief (App. 4a) and denied a Certificate of Probable Cause. The United States Court of Appeals for the Tenth Circuit also denied relief. Wisdom v. Ward, Case No. 98-7114 (10th Cir. 1999) (App. 1a). Petitioner appeals to this Court from that decision.

STATEMENT OF FACTS

On February 1, 1994, three-year-old Alton Wisdom was brought unconscious to the emergency room with multiple head and body bruises, and the pupil of his left eye was fixed. Alton never regained consciousness, and was pronounced brain dead.

The medical examiner concluded that the most likely cause of death was the subdural hematoma from the violent rotational movement of the brain within the skull which occurs when a child is severely shaken. The fatal injury had been inflicted within twelve to twenty-four hours before Alton was brought to the hospital. Because of the suspicious nature of the injuries, the hospital staff summoned the authorities.

At the time of the incident, Alton had been living in rural

household that included his mother, Polly Wisdom, Petitioner, and two other children. Although divorced at the time of the incident, Petitioner and Polly had previously been married. Alton was Polly's son by Donald Lowe. Polly and Petitioner had resumed living together after Alton's birth.

Deputy Vernon Williams questioned Polly Wisdom at the hospital. In her first statement she said had knocked the child off of the porch. After Williams' conversation with Polly, he advised Petitioner of his Miranda v. Arizona, 384 U.S. 436 (1966), rights and interviewed Petitioner.

Petitioner told Williams that he was not present when Alton was hurt, but Polly said the child had fallen from the porch. Not satisfied with these stories, Williams interviewed Polly again concerning the discrepancies the two stories. Polly then changed her story and said Alton was injured when Alton had been alone with Petitioner. Polly said Petitioner at first resisted taking the child to the hospital because he feared arrest, and he wanted to fabricate a story. Based on this information Williams placed Petitioner under arrest for child abuse.

On the following day Judy Hutchins, an investigator for the District Attorney, interrogated Petitioner in the Johnson County Sheriff's Office. This interrogation was video taped, and the tape was subsequently introduced at the trial as State's Exhibit 2. The content of the tape will be discussed in detail the argument section of this petition.

Investigation produced no forensic evidence or new witnesses to events of the late afternoon of February 1st when Petitioner and Alton were left alone together at Polly's residence. The State did find witnesses to Petitioner's unkind and physically abusive actions to the child before February 1st. When Alton was pronounced dead on February 8, 1994, the State charged Petitioner with first degree child abuse murder. At trial, the State presented much of the evidence outlined above in its case in chief. The jury found Petitioner guilty of murder in the first degree, and sentenced him to death.

ARGUMENT/REASONS FOR GRANTING THE WRIT

QUESTION ONE

The State's failure to provide the hearing impaired Defendant access to his hearing aid before interrogation violated the principles of Miranda.

The Tenth Circuit erred in holding that Petitioner voluntarily, knowingly and intelligently waived his constitutional right to silence. Therefore the introduction of Petitioner's statements into evidence violated his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

After Petitioner was arrested for child abuse, Judy Hutchins, interrogated Petitioner. This interrogation was video taped, and introduced at the trial as State's Exhibit 2. Petitioner's admissions during the interrogation provided most of the State's evidence against him. However, at no time did Petitioner admit to shaking the child, or even mention shaking when he talked to Ms. Hutchins.

Prior to the admission of Petitioner's statement into evidence, a hearing was held in accordance with Jackson v. Denno, 378 U.S. 368 (1964), so that the trial judge could determine whether the statement had been voluntarily given. The court found the statement voluntary. The Oklahoma Court of Criminal Appeals reviewed the Jackson v. Denno hearing in their opinion in Petitioner's direct appeal and found no error in the admission of the statement. Wisdom, at 391.

The federal district court found that Petitioner failed to demonstrate through clear and convincing evidence that the state court's factual findings were incorrect pursuant to 28 U.S.C. §2254(e)(1). (App. 7-8a). Therefore, according to the district court, Petitioner failed to show he was entitled to relief. Id. The Tenth Circuit affirmed the federal district court.

Petitioner executed a Miranda waiver. However the execution of such a waiver does not resolve the issue of the adequacy of a waiver of constitutional rights. A statement given pursuant to custodial interrogation is not admissible unless the State can show that the accused waived his constitutional rights:

> . . . with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding an interrogation' reveal both uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Morane v. Burbine, 475 U.S. 412, 421 (1986). The burden of proving this "requisite level of comprehension" clearly on the State. 384 U.S. at 475.

Here, the State failed to meet this burden because its proof did not meaningfully deal with Petitioner's hearing handicap. The federal district court's denial of relief rests simply on the notion that Petitioner's waiver of his right to remain silent was knowing when "[v]iewing the totality of the circumstances..." (App. 7a). However, the district court did not dispute that Petitioner has a severe hearing impairment and that Petitioner was not wearing his hearing aid when the interview with Hutchins took place.

At the hearing on the motion to suppress the statements, defense witness Larry Paul Penwright, a hearing aid specialist, testified that Petitioner's understanding loss ranged from seventy to eighty percent when he is not wearing any hearing aids. Penwright also testified that with two hearing aids Petitioner could understand about fifty-six to sixty percent of what a person was saying without looking at the person, but to understand the rest of the conversation he would have to lip read. Petitioner then testified with the aid of hearing aids. Prior to his arrest in this case, Petitioner had only one hearing aid which he wore in his left ear because he believed he could hear better out of his right ear. **When Petitioner was interviewed by Hutchins he was not wearing this hearing aid.** Petitioner testified

that he did not understand everything that she told him about rights; Hutchins told him he had a right to have a lawyer present and that he did not have to talk to her, or "something like that". What else Petitioner understood is less clear. At one point Petitioner seemed to concede that he recalled Hutchins telling him that he could stop talking if he wanted to, but shortly thereafter he testified emphatically that he did not remember any such warning.

The state trial court denied the motion to suppress solely upon the strength of Petitioner's statements and actions during the interview, in particular, the fact that at the end he stated he wanted to stop the interview. The prosecution presented no witnesses to refute the evidence of Petitioner's substantial hearing disability.

Petitioner demonstrated an "apparent" ability to carry on a conversation with Ms. Hutchins. However, being able to understand generalized questions about what happened on the day in question is different than understanding the nuances of Miranda. Petitioner's actions underscored his lack of understanding. Petitioner was confused by the bottom part of the waiver when Hutchins read it to him verbatim. At one point he said he wanted to talk to his mother about a lawyer, and then said "Because if I want to stop -- see, when I make it like I want my lawyer here." Hutchins then attempted to again explain to Petitioner his right to counsel, and he gave affirmative responses, which in and of themselves did not indicate any great degree of understanding, and concluded by agreeing to talk. Despite his apparent agreement he still indicated he wanted to see his mother.

The problem here is clear: Petitioner's responses were from a man who could not hear seventy to eighty percent of what was being said, and the court could not know if he really understood what was being explained to him or if he was merely being agreeable. According to Penwright, persons with hearing losses sometimes pretend to understand words being spoken to them when they really do not.

At trial Ms. Hutchins testified that she had been told Petitioner had a hearing problem, but she did not say when she was so advised.

However, her questions at the beginning of the tape recorded conversation clearly indicate that she knew about his hearing difficulties. **Despite her apparent knowledge of Petitioner's diminished hearing capability, she admitted at trial that she did not ask him any specific questions about his hearing loss.** If she had, she would have found out that he needed a hearing aid, and that he was not wearing a hearing aid during the interview.

Petitioner's ability to understand and appreciate a verbal explanation for the confusing written waiver of his rights was hampered by his inability to hear as opposed to an inability to read. Petitioner told Hutchins that he was confused by the waiver portion of the written Miranda warnings, especially the part about waiving counsel. Because he could not understand the written waiver, his signature on the form resolves nothing. The undisputed evidence is that Petitioner, **without his hearing aid**, could only hear a small fraction of what was being said. Further, the State's basis for alleging Petitioner actually "heard" and "understood" his rights comes from Petitioner's answers to the Hutchins' reading of his rights. For instance, Petitioner simply answers "Yeah" or "Yes" to her questions about his understanding of his rights. However, Petitioner's affirmative responses in and of themselves did not indicate any degree of understanding. Despite Petitioner's apparent agreement, he still indicated that he wanted to see his mother.

Because the record is not clear as to what portions of Hutchins' statements Petitioner was able to understand, it is impossible to determine if Petitioner knowingly and voluntarily waived his rights or instead simply yielded to Hutchins' persuasive pressure. Petitioner may have thought that he had to talk to Hutchins before he could speak to his mother or an attorney. It follows that the admission of his statement under these circumstances was reversible error.

It is undisputed Investigator Hutchins was interviewing a handicapped person, and she apparently knew that he was hard of hearing. **Yet law enforcement did nothing to find out if Petitioner needed a hearing aid, had a hearing aid, or was using his hearing aid.** Petitioner was in custody and, without help, was not in a position

to retrieve his hearing aid if he did not have it with him. Only members of law enforcement were in a position to resolve this problem and insure that Petitioner could fully understand everything being said.

This interrogation was important, and constituted the most critical evidence against Petitioner because of the admissions that he made. Unfortunately, the law enforcement authorities did not insure that Petitioner knowingly and voluntarily waived his constitutional rights, and therefore it was error to admit his statement into evidence. This Court should grant the petition for writ of certiorari.

QUESTION TWO

Police deceptions and implied promise of leniency improperly induced admissions from the Defendant in violation of the principles of Miranda.

As discussed above, the introduction of the statements violated Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

During her interrogation of Petitioner, Investigator Hutchins prefaced her questioning about the facts of the incident with comments that created an extremely misleading picture as to what was actually happening at the interview: the primary reason why she was questioning him was to obtain information that would assist in the treatment of the victim; that law enforcement was not out to get him; and she would be a witness for him if he would cooperate. These statements and promises were designed to overcome Petitioner's free will and induce him to make a statement more incriminating than he wanted to give. First, there was the explicit promise to be a witness for Petitioner. Then there was the more subtle, but powerful, implication that this interview was really not aimed at solving a crime, but instead to assist the doctors in the treatment of the child. Accompanying that implication was the equally powerful implication that any help Petitioner could give would be greatly appreciated by the

police, who at this point were more interested in helping the child than "getting" Petitioner.

Hutchins' use of trickery or coercion is evident from the record. During her interrogation of Petitioner, Investigator Hutchins prefaced her questioning about the facts of the incident with comments that created an extremely misleading picture as to what was actually happening at the interview:

- She started the interview by explaining to Petitioner that the "purpose" for her questions was **"to try to figure our what's going on with the baby, okay?"**
- She made a few more statements along these lines, including the comment that the sooner they got the truth out the better off everyone would be including the baby: **"I'm interested in knowing so that we can treat this baby exactly how those injuries occurred."**

These statements by Hutchins show a powerful implication that this interview was really not aimed at solving a crime, but instead to assist the doctors in the treatment of the child, and not "get" Petitioner. After promising Petitioner that the police were not out to "get him", Hutchins in the next breath implied she would be a witness "for him" if he talked to her: **"I'll get on the court stand and say you were honest with me."** These statements and promises were designed to overcome Petitioner's free will and induce him to make a statement more incriminating than he wanted to give. She achieved her desired results.

This Court has held that confessions induced through promises of benefit or leniency are inadmissible. Bram v. United States, 168 U.S. 532, 542-543, 565-566 (1897). Accordingly, if Petitioner's admissions were induced by promises to spare him from prosecution or the death penalty for this homicide, or any other benefit, his statements were inadmissible against him.

This Court has determined that the ultimate test of the voluntariness of a confession is whether it is the product of the free

and unconstrained choice by its maker. In determining whether the maker's will is overborne the court must look to the totality of the circumstances, including the characteristics of the accused and the details of the interrogation. See Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). The proper test was set forth in 1897 in Bram v. United States, supra.:

> ... a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any **direct or implied promises, however slight,** nor by the exertion of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.

168 U.S. at 542-543.

Moreover, when the defendant challenges the admissibility of a statement or confession, the burden is on the State to show through at least a preponderance of the evidence that the confession was voluntary. Lego v. Twomey, 404 U.S. 477, 489 (1972). Here, the statements of Petitioner should not have been admitted because law enforcement authorities deceived Petitioner by implied promises.

In Petitioner's case it appears Hutchins was not acting in good faith when she repeatedly asserted that more information about the assault was needed to treat Alton's injuries. By the time of Hutchins' interview with Petitioner on the afternoon of February 2, 1994, Dr. Borne had done all that he could do for Alton. The medical cause for Alton's condition was the subdural hematoma on the left side of Alton's brain, and Dr. Borne had already performed a craniotomy to relieve this condition. Since Hutchins had been at the hospital the previous night after Alton's surgery, she had to have known of his condition at the time of her interrogation of Petitioner.

Accordingly, Hutchins' "pleas" for information as to the details of Petitioner's physical blows on the victim's person were not an honest attempt to gain information to assist in the treatment of the child. Rather, her "pleas" were an investigative technique intended to pry incriminating admissions from Petitioner through a deceptive appeal to his parental instincts. This manufactured pressure, in conjunction with Hutchin's other statements, should weigh heavily against the State in this Court's analysis of the totality of the circumstances surrounding Petitioner's inculpatory statements.

Hutchins' promise to testify for Petitioner, and her implied promise of leniency in return for Petitioner's assisting in the treatment of the child with explicit admissions about the blows inflicted on the child, not only improperly induced him to give incriminating statements, but also undermined the Miranda warnings that had previously been given.

Trickery has no place in the portion of an interview concerning the accused's waiver of his rights. In Miranda the Supreme Court stated: "...any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Miranda, 384 U.S. at 476.

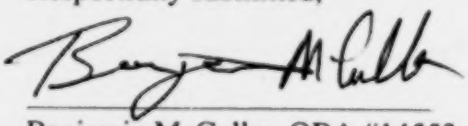
The State has the burden of proving both that the accused's confession was given voluntarily, and that his confession was given after he knowingly and intelligently waived his rights. Edwards v. Arizona, 451 U.S. 477, 483-484 (1981). The State cannot legitimately claim to have met either burden if in the course of the interview the police confuse and dilute the Miranda warnings by indicating to the accused that his statements may not be used against him in a criminal prosecution, but instead are being obtained for some other less hostile and more benign purpose, and that the police will be grateful for his cooperation. An implied promise that one's statements will not be used to prosecute him for a crime destroys a previous waiver of rights because the accused is no longer aware that he is waiving his rights. Such a promise also renders a resulting inculpatory admission involuntary because the accused is no longer aware that he is supplying the police with evidence that will be used against him.

Thus, it follows that under these circumstances discussed above, the State's proof that Petitioner's statement was voluntary, knowing and intelligent must fail, and Petitioner's admissions to Investigator Hutchins should be found inadmissible. The Tenth Circuit erred in finding otherwise. This Court should grant the petition for writ of certiorari and grant the writ.

CONCLUSION

As discussed above, law enforcement authorities did not insure that Petitioner knowingly and voluntarily waived his constitutional rights, and therefore the admission of his statement was erroneously admitted into evidence. Therefore, this Court should grant the petition for writ of certiorari and order the writ of habeas corpus be issued.

Respectfully submitted,



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APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

May 18, 1999
Patrick Fisher
Clerk

UNITED STATE COURT OF APPEALS
TENTH CIRCUIT

JOHNSON WISDOM,

Petitioner - Appellant,

vs.

RON WARD; THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Respondent - Appellee.

No. 98-7114
(D.C. No. CIV-97-527-P
(E.D. Okla.)

ORDER AND JUDGMENT*

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

Before ANDERSON, KELLY, and BRISCOE, Circuit Judges.**

Mr. Wisdom seeks to appeal from the district court's dismissal of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Mr. Wisdom was convicted in state court of first degree murder, and on direct appeal challenged the use of a videotaped statement in his trial on the basis that he did not voluntarily, knowingly, and intelligently waive his constitutional rights. The Oklahoma Court of Criminal Appeals affirmed his conviction, finding

> that [t]he totality of the circumstances surrounding the taking of [Mr. Wisdom's] statement, including the characteristics of the accused and the details of the interrogation, support a finding that [Mr. Wisdom] knowingly and voluntarily relinquished his Miranda rights and that he did not make his statement pursuant to trickery or under coercive circumstances.

Wisdom v. State, 918 P.2d 384, 392 (Okla.Crim.App.1996).

Mr. Wisdom raised the same arguments in his federal habeas petition. The district court denied Mr. Wisdom's request for an evidentiary hearing, finding that disputed factual issues could be resolved by a review of the record. The court then held that Mr. Wisdom failed to show that the trial court's decision to admit the videotape into evidence violated clearly established federal law or

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** After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1(G). The cause is therefore ordered submitted without oral argument.

that it was based on an unreasonable determination of factual issues. After a careful reading of the briefs and record, we agree that Mr. Wisdom has not shown by clear and convincing evidence that the trial court's finding that he was not tricked or coerced into making his statement was incorrect, see 28 U.S.C. § 2254(e)(1); nor has he shown that the trial court's finding that he knowingly and voluntarily waived his Miranda rights was contrary to federal law. See id. § 2254(d)(1).

Accordingly, because Mr. Wisdom has failed to make "a substantial showing of a denial of a constitutional right," 28 U.S.C. § 2253(c)(2), we DENY his application for a certificate of appealability and DISMISS his appeal.

Entered for the Court
/s/

Paul J. Kelly, Jr.
Circuit Judge

FILED
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July 24, 1998
William B. Guthrie
Clerk, U.S. District Court
By:_____
Deputy Clerk

UNITED STATE DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

JOHNSON WISDOM,)
Petitioner,)
vs.) Case No. CIV-97-527-P
)
RON WARD; Warden)
Respondent.)

ORDER

This matter is before the Court on petitioner's petition for a writ of habeas corpus and request of an evidentiary hearing. Petitioner, an inmate currently incarcerated at Oklahoma State Penitentiary in McAlester, Oklahoma, attacks his conviction in Johnston County District Court Case Number CF-94-10 for First Degree Murder on the following ground:

> The Oklahoma Court committed federal constitutional error by admitting Petitioner's video taped statement into evidence when Petitioner did not voluntarily, knowingly and intelligently waive his constitutional right, and therefore the introduction of the statements violated Petitioner's rights under the Sixth, Eight, and Fourteenth amendments of the United States Constitution and Oklahoma Law.

Specifically, petitioner alleges his videotaped statement should not have been admitted into evidence, because the prosecution failed to prove he knowingly and intelligently waived his rights. While petitioner did execute a waiver pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), he maintains his severe hearing loss prevented him from understanding his rights. According to petitioner, he was not wearing his hearing aid when he was interviewed and videotaped. Without the hearing aid, he allegedly could understand only 56-60% of what the interviewer was saying to him, if he was not looking at the other person and reading lips.

Petitioner further asserts his videotaped statement was involuntary, because the interviewer misled him about the purpose of the interview. The interviewer told petitioner she wanted to find out how the victim was injured, so he could receive the proper treatment. She also stated that law enforcement was not out to get petitioner, and if petitioner cooperated, she would testify on his behalf.

Respondent concedes that petitioner has exhausted his state court remedies for the purpose of federal habeas corpus review and has submitted the following records to the court for consideration in this matter:

A. Opinion affirming petitioner's conviction, reversing petitioner's death sentence and remanding the case for resentencing. Wisdom v. State, 918 P.2d 384 (Okla. Crim. App. 1996).

B. The State's brief in petitioner's direct appeal.

Initially, the petition for habeas corpus relief includes a request for an evidentiary hearing on any issue involving facts not apparent from the existing record and any issues involving facts disputed by respondent. However, petitioner does not allege any particular factual issues which would be the subject of the proposed hearing. The court finds that an evidentiary hearing is not required, because all the issues can be resolved by a review of the record. See

Townsend v. Sain, 372 U.S. 293, 312-318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). See also 28 U.S.C. § 2254(e)(2).

A review of the record indicates that on February 1, 1994, three-year-old Alton Wisdom was brought to the emergency room of an Ada, Oklahoma, hospital, unconscious and suffering from multiple bruises and a subdural hematoma. Wisdom, 918 P.2d at 387. After a sheriff's deputy questioned Alton's mother and petitioner, petitioner was arrested for child abuse. Id. The next day, petitioner read a Miranda waiver of his rights and was interviewed at the Johnston County Sheriff's Office by Judy Hutchins, a criminal investigator. Wisdom, 918 P.2d at 387, 391.

Petitioner admitted in the videotaped interview to numerous incidents of deliberately hurting Alton and making him cry the previous day. Id. At 388. He stated he had hit Alton's head with his hand possibly more than five times, knocked him off the porch twice, and rolled over his head two times. Id.

Alton never regained consciousness and was pronounced brain dead on February 8, 1994, and petitioner was charged with First Degree Murder. Id. at 387, 389. Prior to admission of petitioner's videotaped statement into evidence, the trial court held a hearing in accordance with Jackson v. Denno, 378 U.S. 368 (1964), to determine whether the statement should be admitted at trial. Wisdom, 918 P.2d at 391. Paul Penwright, petitioner's witness, testified he was qualified to test individual for hearing loss. Id. Penwright had conducted hearing tests on petitioner and determined petitioner suffered substantial hearing loss. Id. He stated that persons with hearing loss may pretend they can hear when they cannot, but it is normal for a hearing impaired person to ask the speaker to repeat himself. Id. He Penwright also testified he had reviewed the videotape and noted that petitioner asked to have questions repeated when he did not hear the questions. Id. In addition, petitioner had given "rational and responsive answers" to questions, indicating petitioner "heard and understood the questions." Id.

Petitioner testified at the hearing that he remembered Hutchins telling him about his Miranda rights, but he could not understand the rights because of his poor hearing. He did recall, however, "that she told him that he had a right to have a lawyer present and that he did not have to talk to her if he did not want to "or something like that." Id. Petitioner vacillated in his testimony about whether he was advised he could stop talked during the interview. Id. However, he admitted he was willing to talk with Hutchins until he told her he wanted to end the interview, and he heard Hutchins when she repeated her questions. Id.

With respect to petitioner's claim regarding his hearing loss and the investigator's alleged deception about the purpose of the interview, the Oklahoma Court of Criminal Appeals found:

> ...The comments complained of were not coercive in nature; they did not threaten [petitioner] or imply promises of benefits or leniency.
>
> The totality of the circumstances surrounding the taking of [petitioner's] statement, including the characteristics of the accused and the details of the interrogation, support a finding that [petitioner] knowingly and voluntarily relinquished his Miranda rights and that he did not make his statement pursuant to trickery or under coercive circumstances. Accordingly, [petition's] statement was properly admitted at trial.

Wisdom, 918 P.2d at 392

Respondent asserts that because the Court of Criminal Appeals considered and found no merit in petitioner's claims in his direct appeal, he is not entitled to habeas corpus relief. Under the revised federal habeas corpus statues, habeas corpus relief is proper only when the state court adjudication of a claim:

> (1) resulted in a decision that was contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; of

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court.

ACCORDINGLY, petitioner's request for an evidentiary hearing is denied, petitioner's petition for a writ of habeas corpus is denied, and this case is dismissed in its entirety.

IT IS SO ORDERED this 24th day of July, 1998.

/s/_____
JAMES H. PAYNE
UNITED STATES MAGISTRATE JUDGE